



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

| APPLICATION NO.       | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------------|-------------|----------------------|---------------------|------------------|
| 10/774,157            | 02/06/2004  | Lukas Eisermann      | PC888.00/31132.123  | 7280             |
| 46333                 | 7590        | 02/25/2008           | EXAMINER            |                  |
| HAYNES AND BOONE, LLP |             |                      | PHILOGENE, PEDRO    |                  |
| 901 Main Street       |             |                      | ART UNIT            |                  |
| Suite 3100            |             |                      | PAPER NUMBER        |                  |
| Dallas, TX 75202      |             |                      | 3733                |                  |
|                       |             |                      | MAIL DATE           |                  |
|                       |             |                      | DELIVERY MODE       |                  |
|                       |             |                      | 02/25/2008          |                  |
|                       |             |                      | PAPER               |                  |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

|                              |                                      |   |  |
|------------------------------|--------------------------------------|---|--|
| <b>Office Action Summary</b> | <b>Application No.</b><br>10/774,157 | <b>Applicant(s)</b><br>EISERMANN ET AL. |  |
|                              | <b>Examiner</b><br>Pedro Philogene   | <b>Art Unit</b><br>3733                 |  |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1)  Responsive to communication(s) filed on 20 November 2007.
- 2a)  This action is **FINAL**.                      2b)  This action is non-final.
- 3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4)  Claim(s) 1-3,5-25 and 27-40 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5)  Claim(s) \_\_\_\_\_ is/are allowed.
- 6)  Claim(s) 1-3,5-25,27-40 is/are rejected.
- 7)  Claim(s) \_\_\_\_\_ is/are objected to.
- 8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9)  The specification is objected to by the Examiner.
- 10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All    b)  Some \*    c)  None of:
1.  Certified copies of the priority documents have been received.
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 5-22,30-40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Huppert et al. (WO 03/039400) in view of Baccelli et al. (6,454,805).

With respect to claims 1, 22, 30, Huppert et al disclose a prosthetic device for anterior-oblique insertion into an intervertebral space, comprising a first component (112) comprising a first articular surface and opposed first bearing surface, a first flange (2') extending from the bearing surface, the first flange being angled relative to the to the longitudinal and transverse axes of the first components; as best seen in FIG.4, a projection (13) extending from the first articular surface; and a second component (111) comprising a second articular surface and an opposed second bearing surface; a second flange (2) extending from the second bearing surface the second flange being angled relative to the longitudinal and transverse axes of the second component; as best seen in FIG.4, as set forth in page 2, lines 2, 6, 16-24, page 6, lines 9-13, page 7, lines 11-19, 29-31 a recess, as best seen in FIG.3, formed in the second articular surface, the recess being adapted to engage with the projection to provide for articulating motion between the first and second components.

With respect to claims 2-3,5-21,37-39, Huppert et al disclose all the limitations; as set forth; for example, the flange adapted to be positioned within a preformed anterior-oblique opening, as best seen in FIG.4.

It is noted that Huppert et al did not teach of a first component that is triangular in shape to define first, second and third side portions; as claimed by applicant. However, in a similar art, Baccelli et al, column 2, lines 62-65, column 3, lines 21-23, evidence the use of a first component that is triangular in shape to define first second and third side portions in order to insure stable bone fusion.

It is noted that Huppert et al disclose the claimed invention except for an outer bearing surface including an integral first flange and an integral second flange; as claimed by applicant. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the outer surface integrally with the flange, since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. Howard v. Detroit Stove Works, 150 U. S. 164 (1893).

With respect to claims 30-36, 40, the method steps, as set forth, would have been obviously carried out in the operation of the device, as set forth above.

Claims 23-25,27-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Huppert et al. (WO 03/039400) in view of Baccelli et al. (6,454,805) in view of Yuan et al. (5,676,701)

It is noted that the above combination of references disclose all the limitations, except for first articular surface forming a projection and a second articular surface

forming a recess; as claimed by applicant. However, in a similar art, Yuan et al evidence the use of an intervertebral implant having a first articular surface forming a projection and a second articular surface forming a recess to allow an unrestricted motion between the first and second components relative to a patient's normal spinal axis.

Therefore, given the teaching of Yuan et al, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Huppert et al, as taught by Yuan et al to allow an unrestricted motion between the first and second components relative to a patient's normal spinal axis.

### ***Response to Amendment***

Applicant's arguments filed 11/20/07 have been fully considered but they are not persuasive. Applicant stated that Huppert did not teach of an integral first flange and an integral second flange arranged to engage a first vertebra and a second vertebra. However, it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. *Howard v. Detroit Stove Works*, 150 U.S. 164 (1893). Also the use of an outer bearing surface including an integral first flange and an integral second flange is old and well known in the art; as evidence by the pertinent art cited herein, which also discloses a first articular surface forming a projection and a second articular surface forming a recess.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Art Unit: 3733

5,899,941

5-1999

Nishijima et al.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (571) 272-4716. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272 - 4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Pedro Philogene/  
Primary Examiner, Art Unit 3733  
February 15, 2008

Application/Control Number: 10/774,157  
Art Unit: 3733

Page 6